Supreme Court, U. S.
FILED,
NOV 4 1891
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

E. NALLE & CO. ET AL.,
APPELLANTS,
v.
WADE R. YOUNG & WIFE,
APPELLEES.

No. 1099.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

Brief on Appellees' Motion to Dismiss.

JOHN JOHNS,
of Counsel for Appellants.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

E NALLE & CO. ET AL., APPELLANTS,
v.
WADE R. YOUNG & WIFE, APPELLEES.
No. 1099.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

Brief of JOHN JOHNS, *Counsel for Appellants, on Appellees' motion to dismiss.*

The appellants, Nalle & Co., in 1883 brought a suit to foreclose their mortgage (the debt on which was originally $1,500) in the U. S. circuit court for the Western District of Louisiana, and, under the final decree in that cause, rendered November 6, 1886, the mortgaged property was, on July 30, 1887, sold to Mrs. Mary Gholson, one of the appellants, to whom the marshal made a deed and attempted to put her in possession as the purchaser of the same. (Appellees' brief, 2 and 3.)

Thereupon the appellee, Wade R. Young, filed an opposition to the confirmation of the sale and his bill to enjoin the complainants in the foreclosure suit, and the purchaser under the decree therein, and the marshal, from

disturbing him in the possession and enjoyment of the property. (Appellees' brief, p. 3.)

The distinct ground of this bill for the injunction was that his wife's encumbrance, her special mortgage and judgment against her husband recognizing it, which amounted to $7,500, was a valid subsisting encumbrance on the property which the marshal had, under the decree in the foreclosure suit, sold and conveyed to Mrs. Mary Gholson.

Quoting from appellees' brief (p. 3), "as the *validity* and *rank* of Mrs. Young's mortgage was to be *passed on*, and as she had the same right *to contest* the adjudication, she was a proper and necessary party to the proceeding, and was allowed to file an intervening petition," and became a party to this suit for an injunction, etc.

That is to say, a matter for the decision of the Court in *this* suit brought by Wade R. Young was whether or not his wife had a valid subsisting lien for $7,500 prior in rank on the property which had been sold to satisfy Nalle & Co.'s mortgage and been conveyed to the purchaser.

The appellees, Wade R. Young and wife, asserted that Mrs. Young's mortgage, which she had, as stated (p. 2 of appellees' brief), agreed she would renounce, was still a valid subsisting encumbrance on the property, had never been released nor postponed to Nalle & Co.'s mortgage, and had priority in rank and precedence in payment out of the property over Nalle & Co.'s mortgage.

The appellants contested the validity and priority thus asserted by the appellees of Mrs. Young's claim for $7,500 by demurrer, plea, and answer, and denied that she had any such encumbrance on the property which had been sold and conveyed as stated. Her claim was plainly the issue in the bill for the injunction. Was it a valid claim or not?

The learned judge below overruled the demurrer and disallowed the plea of the appellants, and decided, upon various authorities "and the principles of general jurisprudence," "that the correctness of the judgment of the State court in favor of the wife against her husband for the sum of seven thousand five hundred dollars, recognizing and making executory her special mortgage on the property, could not be contested by the complainants, whose claim arose after the judgment;" that the sale of the property in the foreclosure suit brought by Nalle & Co. was null and void, and on the 9th day of June, 1890, entered a final decree in favor of Wade R. Young and also of his wife, who had intervened in the injunction suit. (P. 4, appellees' brief.)

From that decree Nalle & Co. and Mrs. Mary Gholson, the purchaser under the foreclosure decree, have appealed, and the appellees, Wade R. Young and wife, now move to dismiss the appeal, "because the matter in dispute, exclusive of costs, does not exceed the sum or value of $5,000."

If the validity and priority of Mrs. Young's judgment and mortgage for $7,500 in their bill for an injunction was not "the matter in dispute," it is hard to conceive what was the issue. Its validity and priority is affirmed by the appellees and denied by the appellants, and was passed on by the court below in favor of Mrs. Wade R. Young, in the decree from which appellants have taken this appeal. The bill was filed to assert and establish it, and it is the matter in contest. (Farmers' Bank *v.* Hooff, 7 Peters, 168; Gibson *v.* Shufeldt, 122 U. S. p. 27).

If the decree of June 9, 1890, establishing the validity and priority of Mrs. Young's judgment and mortgage is reversed, this Court will decide that she renounced in favor of Nalle & Co. her mortgage and judgment for $7,500. How, then, can it be said that only the amount

of the debt from Wade R. Young to Nalle & Co., or the value of the plantation, the security, is the matter in dispute?

Had the court below decided against the validity and precedence of Mrs. Young's $7,500 encumbrance, as claimed in the proceeding in which the decree appealed from was entered, she had the right of appeal beyond question to this Court.

The appellees admit the validity of Nalle & Co.'s mortgage, but say it is postponed and second to Mrs. Young's; the appellant, Mrs. Gholson, the purchaser at the sale under the decree in the foreclosure suit, which was entered Nov. 6, 1886, has the right, on paying off that $7,500 judgment and mortgage, to take the property mortgaged. The final decree, entered June 9, 1890, from which the appeal is taken, calls the bill asking an injunction and to which Mrs. Young was, on her petition, made a party, though filed after the sale of the mortgaged property and its conveyance to the purchaser, speaks of the bill for an injunction, etc., as a cross-bill. It is not so called in appellees' brief. But even if it be, this Court has decided in Lovell *v.* Cragin, 136 U. S. p. 130, that the amount of such a claim as that of the complainant, Mrs. Young, in a cross-bill may be taken into account in determining the Court's jurisdiction.

As the final decree appealed from was entered June 9, 1890, the affidavits filed of the value of the mortgaged property on July 30, 1887, can have no application whatever. (Street *v.* Ferry, 119 U. S. 385.)

We respectfully submit that the appeal in this cause should not be dismissed and that the motion be denied.

JOHN JOHNS,
of Counsel for Appellants.

IN THE SUPREME COURT

OF THE UNITED STATES.

17

E. NALLE & COMPANY, APPELLANTS,

versus

W. R. YOUNG AND MRS. B. F. YOUNG, Appellees.

BRIEF FOR APPELLANTS.

CHARLES J. BOATNER,

Of Counsel.

NEWS JOB OFFICE: MONROE, LA.

SYLLABUS.

I.

Unless a married woman has matrimonial domicile in Louisiana she cannot claim the protection and is not subjected to the liabilities provided for by the law of the State for married women. 44 An., 109, and cases there cited; 12 An., 89; 2nd Robinson, 501.

The domicile of the citizen is in the parish where his principal establishment is. His principal establishment is where he makes his habitual residence. Louisiana Civil Code, Article 38.

Voluntary absence from the State for two years, or the acquisition of residence in another State, forfeits domicile in this. Civil Code, Article 46.

The principal establishment referred to in Article 38 of the Civil Code means domestic establishment. 7 An., 400; 4 An., 554.

Married women are subjected to no disabilities under the laws of the State of Mississippi, but may contract in all respects as if a femme sole. Article 1, Section 1157, Miss. Code.

II.

The special or conventional mortgage results from the contract between parties authorized by law to make a legal contract. Civil Code of La., Art. 3290.

The legal mortgage results by operation of law. Civil Code, Article 3287, 3311.

At a forced sale under execulion (or final process of any kind) property cannot be adjudicated unless the amount bid is sufficient to discharge the privileged and special mortgages on the property which have preference over the judgment creditor. Code of Practice of La., Arts. 683-84.

This rule does not apply where the property is encumbered with general or legal mortgages. Code of Practice of La., Arts. 679, 34 An., 579, 28 An., 593, 1 An., 32, 426, 2 An., 617, 5 An., 736, 7 An., 614.

The legal mortgage upon the husband's property in favor of the wife arises only in two cases prescribed by Article 3376 and Art. 2390 of the Civil Code. It can be preserved as against third persons only by being recorded according to the provisions of Art. 3349 of the Civil Code.

Under the laws of Louisiana the wife can have a special mortgage against the property of the husband in only two cases. First, where by the consent of the wife duly authorized by the judge and with the sanction of five of the nearest relations of the wife he executes a mortgage for the preservation of her dotal rights. Civil Code, Art. 2279. Second, when by the same authority he executes a mortgage to secure her paraphernal rights. Civil Code, 2390.

III.

A judgment of separation of property between husband and wife rendered by a court having no

jurisdiction over either party to the suit is void Code of Practice. Art. 162; 27 An.. 257; 25 La. An., 615; 21 La. An.. 258; 24 La. An., 311.

A judgment of separation not executed by the payment of the rights and claims of the wife, or at least by a bona fide and uninterrupted suit to obtain payment, is void. C. C. 2428, 34 An., 690; 1 Robinson, 431; 28 An., 346.

No mortgage is effective against third persons unless recorded in the manner prescribed by law. Civil Code, 345.

The recordation of the judgment of separation void for want of jurisdiction in the court that rendered it and also for want of execution, does not conform to the requirements of law authorizing the registry of legal mortgages in favor of the wife. Civil Code, 349.

The contract between husband and wife is authorized by the law of Louisiana only in two cases:

1st. When the wife accepts a special mortgage from the husband under the provisions of Aaticles 2390 and 2279 Civil Code,

2nd. When a sale of property is made from the one to the other in the replacement of dotal or paraphernal rights according to the provisions of Article 2446 Civil Code, 38 An., 813, and cases there cited.

Considering the Intervenors and Defendants attack on the Revenue Laws of Louisiana frivolous it has not been considered in the brief.

IN THE SUPREME COURT

OF THE UNITED STATES.

E. NALLE & COMPANY, APPELLANTS,

versus

W. R. YOUNG AND MRS. B. F. YOUNG, Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

Edward Nalle & Co., a cotton factorage and commission house of New Orleans, La., made advances to Wade R. Young, of Vicksburg, Miss., during the year 1882, of the sum of one thousand six hundred and thirty-two dollars and sixty-one cents, in cash and supplies.

To secure the payment of these advances, the defendant Young, on the 2nd June, 1882, executed his promissory note, payable to his own order, for

this sum, due on the 1st of December following, which he endorsed in blank to petitioners, and on the same day executed an act of mortgage upon his plantation in Tensas parish to secure payment of the same which was duly recorded in the mortgage book of that parish. (Rec. page 2.)

This mortgage was not accepted by the mortgagees, until Mrs. B. F. Young, wife of Wade R. Young caused to be cancelled a certain judgment which she held in the parish of Tensas, against Wade R. Young, and purporting to operate as a mortgage on his property in that parish. Rec. 125. And allegation in petition of intervention p. 97.

On failure of defendant to pay the note, plaintiff instituted suit to foreclose in the District Court of Tensas parish, where the mortgaged property was situated. Rec. p. 1.

Defendant removed the case for trial to the Circuit court for the Western district of Louisiana.

Defendant thereupon answered, setting up sundry pleas and a reconventional demand, not necessary to detail, as the judgment as to them is final.

On trial of the case plaintiffs had judgment for the amount of the note, with 8 per cent in-

terest and 5 per cent attorney's fees and decreeing that the mortgaged property be sold in satisfaction thereof. (Record 89 and 90).

An order of seizure and sale was thereupon issued to execute the decree and the mortgaged premises seized by the marshal. The property after the usual advertisement, was adjudicated at marshal's sale on July 30, 1887, to Mrs. Mary Nalle, wife of Eustis Golson, for the sum of two thousand dollars.

The defendant Wade R. Young, thereupon filed his petition opposing the confirmation of the sale (Rec. 103 et. seq.) on a variety of grounds, which will be detailed fully hereafter. This opposition was filed Oct. 12, 1887, and on 15th of same month a writ of injunction was issued restraining Mrs. Golson from taking possession of the propeety. Rec. 116, 117.

On Oct. 12, 1887, Mrs. B. F. Young, filed a petition of intervention, or what would more properly be called in Louisiana practice, a third opposition (Rec. p. 95 et. seq.) in which she asserted the nullity of the sale of the property on the ground that the price bid by Mrs. Golson did not exceed the amount of a special mortgage which she asserted

that she held against it, and that under the laws of Louisiana, no adjudication could be made unless the bid was equal to the amount of all prior special mortgages. That her renunciation of her mortgage was void, because not made according to the forms of law. That the taxes on said property which had been paid by plaintiffs had been illegally assessed and constituted no lien on it, because the Legislature of the State had failed to create a State Board of Equalization, as required by constitution of 1879, and until this was done that no taxes could be assessed or collected in the State. She prayed that the sale made by the marshall be not confirmed.

That a reference be made according to the rules and practice of courts of equity to have the priority of liens determined. That her renunciation of her mortgage and cancellation of her judgment be decreed void, and that the revenue acts of State of Louisiana for 1880, 1882, 1884 and 1886, be decreed unconstitutional, and that the mortgage and judgment asserted by her be decreed the first and ranking lien on the property (Rec. p.103-4).

By an amended petition filed on October 24, 1887, she averred that Wade R. Young, her husband, had remained a citizen of Louisiana until

1883, at which time he declared himself a citizen of Mississippi.

The plaintiffs E. Nalle & Co., demurred to the intervention of Mrs. B. F. Young (Rec. p. 128). This being overruled, they answered (Rec. 134) and denied the right of Mrs. B. F. Young to oppose the confirmation of the sale, or assert a lien prior to that of Nalle & Co., on the following grounds:

1. That as appears by the allegations of her petition she was at the time of the erasure and cancellation of her pretended mortgage, a citizen of the State of Mississippi, having her fixed domicile, and residence at the city of Natchez, in said State, and as such citizen of Mississippi *sui juris* in every respect, having under the laws of said State, as full capacity as a *femme sole* to make any contracts whatever.

2. They deny that said Wade R. Young moved his family to the State of Mississippi with the intention of returning, or that he retained either an actual or constructive domicile in the State of Louisiana. On the contrary they aver that he moved to the city of Natchez in 1876, carrying all his household effects and having disposed of his house in Louisiana, with the avowed intention of making his permanent home and fixed

abode in the city of Natchez, and that his family has since continuously resided and lived in said city of Natchez.

That under the constitution of Louisiana, the said Wade R. Young could not be a citizen of the State, unless an actual resident thereof and that he has not had any sort of residence in said State of Louisiana, either actual or constructive since 1876.

3. That the pretended agreement entered into between Mrs. B. F. Young, Mrs. J. S. Metcalfe and Wade R. Young, under date of Dec. 26, 1876, was void, in so far as the same purported to transfer to said Mrs. B. F. Young the rights of the mortgage therein set forth, because if said contract was the substitution of a special, in lieu of the general mortgage asserted in favor of said Mrs. B. F. Young, the same was beyond her capacity as a married woman.

4. That said Mrs. B. F. Young and Wade R. Young are in equity and good conscience estopped from setting up the said mortgage, by reason of the facts set forth in the plea of estoppel herein filed.

On the issues thus made up, the court avoided

and annulled the marshal's sale of the property—recognized the mortgage asserted by Mrs. Young as the first mortgage on the property and as superior in rank to the mortgage in favor of E. Nalle & Co., and that they pay costs. R. 158-9.

From this decree plaintiffs have appealed.

THE EVIDENCE.

The undisputed facts are as follows:

In the spring of 1882, Wade R. Young, who was a lawyer living at Vicksburg, Miss., and who owned a plantation situated in Tensas parish, applied to E. Nalle & Co., cotton factors of New Orleans, for advances to conduct his planting operations in that parish. They agreed to make the advances on condition that Mr. Young should secure their payment by a special mortgage on his plantation and lien upon the crop to be produced thereon, and that his wife, Mrs. B. F. Young, should waive any rights which she might have in their favor.

In order to carry out the agreement, Mrs. B. F. Young, who had resided in Natchez, Miss., since 1876, authorized the cancellation of her judgment and mortgage against her husband, so as to enable

the recorder of mortgages to give a certificate that the plantation was free of incumbrances.

This cancellation and erasion was made for the express purpose of giving E. Nalle & Co. a first mortgage and of thereby enabling Wade R. Young, her husband, to obtain the advances from E. Nalle & Co. This fact is explicitly acknowledged by Mrs. Young in her petition of intervention, in the following language:

"That said E. Nalle & Co. were well advised and informed of the existence of such prior mortgage in favor of complainant and refused to make such advance unless complainant consented to have the inscription of her mortgage cancelled and erased and thus seek to give them priority of rank. That for the purpose of so renouncing her mortgage in favor of said E. Nalle & Co., and of giving them priority of rank, complainant executed a mandate and power of attorney authorizing the canceling and erasion of her mortgage, and upon such authority her said mortgage was attempted to be cancelled." Rec. p. 97.

The advances were made. Wade R. Young failed to ship any of the cotton according to his contract and failed to pay any part of the debt. Wade R. Young, the principal defendant, had

moved from the State of Louisiana to Natchez, Miss., in 1876, carrying his family and household effects. He rented a house there and his family have lived there ever since.

He filed no declaration of domicile in either Concordia or Tensas parish, had no domicile there of any kind and went there only when business called him. His house, his home and his family were in Natchez. See testimony Wilmer H. Shields, p. 135-6; testimony Jas. Curry, p. 143.

It is contended, however, by defendant and Mrs. B. F. Young, the intervenor, that he moved his family to Natchez merely for purposes of convenience and with the intention of returning to Louisiana. That while his family lived in Natchez *he only took* his meals there and slept *there*. He lived and had his domicil in Louisiana, at his law office.

The answers of both witnesses to the cross interrogatories are evasive, and were objected to at the trial, but the bills of exception to their admission do not seem to have been copied into the record.

It will be found that though both swear that the arrangement was merely temporary, neither can state how long they expected to remain, or

when or to what place they expected to return to Louisiana, and each seems to draw the conclusion that because Wade R. Young practiced law in Louisiana, while his home was in Mississippi, he could, by the mere exercise of his will, be a citizen of either State, as it suited his interest or his inclination. Thus, when he wanted to run for an office he was a citizen of Louisiana, and when he wanted to remove the case for trial to the United States Court, he was a citizen of Mississippi.

ARGUMENT.

There is presented for decision the following legal questions:

I.

Whether Mrs. Wade R. Young was a citizen of the State of Mississippi at the time she consented to the cancellation of her alleged mortgage, and being *sui juris* under the laws of that State, and not subject to the disability of the laws of Louisiana, the act was valid and had the effect of subordinating whatever rights she might have had, to those of E. Nalle & Co.

II.

If it be found that she was not a citizen and resident of the State of Mississippi, and therefore entitled to the protection of the laws of Louisiana,

whether the rights asserted by her constituted a legal or conventional mortgage, and if a legal mortgage, would it prevent a foreclosure of the special mortgage of E. Nalle & Co., unless the price bid at the sale should be sufficient to discharge it.?

III.

Whether the claim asserted by her being that which arises from the judgment of the District Court of Tensas Parish, and the agreement between Mrs. Wade R. Young and Mrs. S. J. Metcalfe, under date of December 2nd, 1876, is not void on its face, and therefore creates no legal right in favor of Mrs. B. F. Young.

AS TO MRS. YOUNG'S CITIZENSHIP IN MISSISSIPPI.

If a citizen of Mississippi, it will scarcely be denied that she was not entitled to the protection nor subject to the disabilities of a married woman under the laws of Louisiana. (44th La. An. 119; 12 La. An. 89; 2 Rob. (La. Reports) 501.

Article 38 of the Civil Code of Louisiana, thus defines domicile: "The domicile of each citizen is the Parish where he has his principal establishment. The principal establishment is that in which he makes his habitual residence."

Article 46 of the same Code provides: "A

domicile once acquired shall not be forfeited by absence on business, but a voluntary absence of two years from the State, or the acquisition of residence in any other State of this Union, or elsewhere, shall forfeit the domicile in this State."

The Supreme Court of Louisiana, in construing the meaning of "principal establishment," as used in the Article, says: "The law which fixes the domicile of each citizen at the place where his principal establishment is situated, means the principal *domestic* establishment." (7 Annual 400.) "Where he sleeps, takes his meals, and surrounded himself with his family and the comforts of domestic life, his dwelling housa there is emphatically his permanent home." 4th La. Annual 554.

The domicile of a citizen of Louisiana is the Parish where he has his principal establishment. A citizen of Louisiana must be an actual resident thereof. Under the Constitution of 1879 (Article 185,) and the plain and unambiguous terms of Article 46 of the Civil Code of Louisiana, Wade R. Young had lost his domicile in Louisiana long before Mrs. Young authorized the cancellation of the judgment mortgage she claimed against him. They had voluntarily abandoned the State in 1876, having sold their home and carried with them all

their household goods. They had acquired a residence in Natchez, which, at the time this contract was made, they had occupied for seven years previously. It is, in our opinion, a legal impossibility for one to be a resident or citizen of a State in which he neither has a home nor lives, while he does have a home and lives in another.

The subject has been much considered in Louisiana, and our Courts have uniformly held that, while temporary absence and the possession of residences out of the State, occupied almost permanently by the family, will not forfeit the domicile of a citizen who owns an establishment in the State where he lives himself and conducts his business. Yet in no instance has it been held that the mere intention to preserve the domicile will suffice to do so, when all the other conditions are wanting.

In the present instance the plaintiff acted on the assumption that the domicile of Mr. and Mrs. Young was where they had lived seven years, and that they could not arrest the effect of the laws of the State which provide that domicile is acquired or maintained only by actual residence.

Is the mortgage asserted by intervenor conventional or legal?

Articles 683 and 684, of the Code of Practice of Louisiana, prevent the adjudication at execution sales unless the price paid is sufficient to discharge the privileges and special mortgages existing on the property, which have the preference over a judgment creditor.

Article 683 declares: "But if there exists on the property any privileges or special mortgages in favor of other persons than the judgment creditor, and which are preferred to him, the sheriff shall announce that the purchaser shall be entitled to retain in his hands, out of the price for which the property was adjudicated, the amount required to satisfy the privileged debts and *special* hypothecations to which the property sold was subject, but that he shall be bound to give his obligation for the surplus, if there be any, and subscribe his obligation at twelve month's credit, with security as is stated above."

The following Article, 684, prohibits the adjudication, unless the price offered is sufficient to discharge the privileges and special mortgages existing on the property.

If, therefore, the mortgage claimed by the intervenor, was conventional (contractive) and had been properly recorded, no sale of the mort-

gaged property could be made under a junior incumbrance unless the price bid was sufficient to discharge the prior lien; but if the prior mortgage is *legal*, or judicial, there is no such requirement; the property passes to the purchaser, subject to their payment. C. P. 679; 54 A. 579; 28 A. 593; 1 A. 32-426; 2 A. 617; 5 A. 736; 7 A. 614.

The Circuit Court held that the mortgages asserted by Mrs. B. F. Young was a special hypothecation which took precedence over that of the plaintiff, and that her waiver of the same in favor of the plaintiff was void, and that the price bid not being sufficient to discharge the prior special mortgage, the adjudication was void.

The pivotal question to be determined, admiting for the sake of argument. that the intervenor has asserted any lawful rights at all, is whether the mortgage claimed by her is legal or conventional. The following authorities demonstrates that it is "legal" if anything.

The Civil Code of Louisiana declares that a conventional mortgage is a contract by which a person binds the whole of his property or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession." Civil Code 3290. It may

be either by public (Notarial) or by private act, but it must be in writing, and must be recorded in the mortgage book of the parish where the mortgaged property is situated. C. C. 3346-7.

A legal mortgage results by operation of law. Civil Code 3287, 3311. "And no legal mortgage shall exist, except in the cases determined by the present Code." Civil Code 3312.

The property owned by the married woman in Louisiana must be dotal or paraphernal. It is dotal when given or received in consideration of the marriage, C. C. 2337.

It is paraphernal, when not declared by marriage contract to be brought in marriage by the wife, or to be given her in consideration of the marriage. C. C. 2383.

A legal mortgage is created on the property of the husband to secure the dowry by the following Article of the Code:

"The wife has a legal mortgage on the immovables, and a privilege on the movables of her husband, to-wit: 1. For the restitution of her dowry, as well as for the replacement of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the mar-

riage. 2. For the restitution of her dowry as well as for the replacing of her dotal effects, which she acquired during the marriage, either by succession or by donation, from the day such succession devolved to her, or such donation began to have its effect." Art. 2376 La. Civil Code.

And Article 2390, C. C., creates a legal mortgage to secure the payment of the paraphernal funds received by the husband and converted to his own uses in the following language: "*But should it be proved* that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same.

The husband may release the mass of his property from this legal mortgage, by executing a special mortgage in the manner required in the preceeding section, for dotal effects."

The mortgage claimed by the intervenor must be based, either on the judgment decreeing a separation of property, and recognizing her mortgage for $7500, or on the contract between herself and Mrs. S. J. Metcalfe by which Mrs. Metcalfe pur-

executed by the payment of the rights and claims of the wife, made to appear on an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment." Civil Code Art. 2428.

The foregoing are the statute laws of the State of Louisiana bearing upon and controlling the case under consideration.

The intervenor alleges an indebtedness on the part of her husband to her, arising from his having received the proceeds of a life insurance policy on the life of her father, in her favor, for the sum of $5,000.00, and the additional sum of $2,500.00, being the amount due her by his purchase of property belonging to her father's estate, in excess of the amount necessary to pay debts.

This would, unquestionably, constitute a paraphernal claim against the estate of her husband, but in order to be effective against third persons and to operate as a legal mortgage, must have been recorded in the parish where the property to be affected is situated, and in the manner provided by law. We unhesitatingly assert that there is no evidence in this record showing such recordation. The judgment which appears to have been re-

corded in the mortgage office of the parish of Tensas, is as follows:

MRS. B. F. LIDDELL,		9th District
vs.	No. 3050.	Court,
WADE R. YOUNG, HER HUSBAND,		Parish of Tensas.

In this case a regular trial was had after issue joined, and the law and the evidence being in favor of the plaintiff and against the defendant, it is ordered, adjudged and decreed that there be judgment of separation dissolving the community of acquets and gains between the plaintiff, Mrs. Bethia F. Liddell, and the defendant, Wade R. Young, and that said plaintiff do have and recover judgment against said defendant for the sum of $7,500.00, with a recognition of her mortgage on the property described in the petition, and the same be sold to satisfy said judgment and costs. Thus done and signed in open court, this 9th day of July, 1881."

Under the general demurrer which we filed and which was overruled by the Circuit Court we assign the following causes of nullity of this judgment, patent on the face of the papers.

1st. There was neither allegation or proof that either party to the suit were, at the time the same was instituted or the judgment rendered, residents of Tensas Parish; on the contrary, the

ported to transfer to her an indebtedness alleged to be due by W. R. Young and secured by a mortgage, on the property in controversy.

If the former, it is confessedly a legal mortgage because it purports to be a judicial ascertainment of the amount of her paraphernal claims against her husband, to secure the payment of which the *law* creates a mortgage on all his immovable property. If the latter, it is void on its face.

The only special mortgage which the laws of Louisiana permit the husband to execute to the wife is that authorized by the Article just quoted 2390, and Article 2279, to which it refers. The latter Article reads as follows: "During the marriage the husband may, with the consent of his wife, if she be of age, be authorized by the Judge, with the advice of five of the nearest relatives of the wife or friends for want of relations, to mortgage specially for the preservation of his wifes rights, the immovables which he shall designate; and then the surplus of his property shall be free from any legal mortgage in favor of his wife."

There is no pretence that any such formality was complied with, and it is evident that a legal mortgage on all the property of the husband and a

special mortgage on part of it could not exist at the same time. The legal mortgage once called into existence, remains until merged into a special mortgage according to the provisions of the foregoing statutary provisions. No such merger having taken place it existed as a legal mortgage at the date of the marshal's sale if it existed at all and hence was no bar to an adjudication for an amount insufficient to satisfy it.

Do the pleadings and evidence show the existence of *any* valid claim in favor of intervenor effective against third persons?

"The wife has, even during the marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits as above expressed." Civil Code 2391.

"The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration. Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves." Civil Code 2427.

"The separation of property, although decreed by a court of justice, is null, if it has not been

evidence shows that they had removed from Catahoula Parish in 1876, to the city of Natchez, and that they had continuously resided there until the commencement of this suit. That Wade R. Young claimed his residence in Concordia Parish and his wife resided in Natchez; therefore, under no possible hypothesis could the District Court of Tensas Parish have any jurisdiction whatever of the case. The code of practice of Louisiana provides: "It is a general rule in civil matters that one must be sued before his own judge; that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law." Code of Practice, Art. 162.

This Article was amended by an act of the Legislature of Louisiana, approved March 19th, 1861, by the addition of the words "and shall not be permitted to elect any other domicile or residence for the purpose of being such." The object of the amendment was to prevent the institution of collusive suits in parishes out of the domicile of the debtor, whereby fraudulent advantages of creditors and other persons interested might be

taken, and the Supreme Court of Louisiana has frequently held that all judgments rendered in courts which had no jurisdiction, either of the person of the defendant or of the subject matter of the suit, were void. 27 La. Annual 257; 25 La. A. 515; 21 La. A. 258; 24 La. A. 311.

It is very true that our court has subsequently held that where suit is instituted in good faith by the plaintiff without knowledge of defendant's non-residence and the defendant pleads to the merits instead of excepting to the jurisdiction of the court, the judgment will be valid. But in no case has it been held that in a suit evidently collusive, can the court without jurisdiction "ratione personae" and "ratione materiae" render a valid judgment.

In the case under consideration, the suit was evidently brought by defendant, and his mere consent could not create jurisdiction where none existed. Only the court having jurisdiction of the person of defendant could entertain the demand by the wife for a judgment of separation and to liquidate the paraphernal claims of the wife against the husband.

2nd. Under repeated decisions of the Supreme Court of Louisiana, and under the express terms of

the Article of the Civil Code heretofore cited, the judgment of the wife against the husband not carried to final execution within a reasonable time after its rendition becomes void. See 34 A. 690. (Chaffe vs. Scheen), 1 Rob. 431; 28 A. 346.

The judgment is therefore void so far as it dissolved the community and granted a separation of property to Mrs. B. F. Young, because the court which rendered it was without jurisdiction. It is void in so far as it liquidated the amount of the debt due the plaintiff therein, because not carried to execution by bona fide non-interrupted suit. The judgment was rendered on the 9th day of July 1881, and Mrs. B. F. Young authorized this cancellation in 1882, more than one year after its rendition, when its final execution could have been accomplished, if the judgment was valid, within forty (40) days after the adjournment of the court which rendered it and its recordation did not preserve a legal mortgage, because it did not conform to the legal requirement which is as follows:

"All mortgages whether conventional, legal or judicial, are required to be recorded in the manner hereinafter provided." Civil Code 3345.

"To preserve a legal mortgage or privilege existing in favor of a married woman, it shall be the

duty of said married woman or any person for her to cause to be recorded in the mortgage book of the parish where is situated, the evidence of her mortgage or privilege. If such evidence be in writing it shall be recordrd in the manner required by law; if it be not in writing, then a written statement, under oath, made by a married woman, her husband or any other person having knowledge of the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based, shall be recorded." La. Civil Code 3349.

3rd. The judgment being void for the reasons assigned makes no proof whatever against creditors, and to enforce the same against them, her claims must be established by other evidence than the mere declarations made in the pleadings.

4th. The contract between Mrs. S. J. Metcalfe and B. F. Young, relied upon to support Mrs. Young's claim against Wade R. Young, for the sum of five thousand dollars, is null on its face. Tr. pp. 123–4.

It appears from this involved and complicated document that Wade R. Yonng, was the debtor in part of a promissory note made and signed by himself, W. C. Young, and Margaret A. Young, for the

sum of $11,250.00, which was owned by Mrs. S. J. Metcalfe as the residuary legatee of Mrs. Elisa H Young, and that the payment of this note had been secured by a special mortgage on St. Peter's Plantation, and that Mrs. S. J. Metcalfe as one of the heirs of B. F. Young, deceased, the father of Wade R. Young, and herself, was indebted to Wade R. Young, her co-heir, for certain sums of money received by her in advance of her portion from her father during his life time, and from his executors after his death, and for which she was liable to account to Wade R. Young at the ultimate partition and settlement of the estate of B. F. Young; that Wade R. Young being indebted to his wife, Mrs. B. F. Liddell, grants an acquittance to Mrs. Metcalfe for what she might owe him by way of collation in the final settlement of their father's succession, and Mrs. Metcalfe transfers her interest in the mortgage note of Wade R. Young to Mrs. B. F. Liddell, his wife. The legal effect of such a state of facts would have been the mutual extinguishment of the debts. If Mrs. Metcalfe owed Wade R. Young an amount equal to $5,000.00 and he owed her the same amount, the debts compensated each other.

There was no consideration flowing from Mrs.

B. F. Young to Mrs. S. J. Metcalfe for the transfer. Mrs. S. J. Metcalfe received the acquittance from W. R. Young for the amount which she owes him while the amount which it is claimed he owed her was transferred to Mrs. B. F. Young. Now unless Mrs. Young thereby renounced and surrendered her paraphernal claims against her husband, to an equal amount, she would have received a debt against him, not only without paying any consideration for it, but which he had just by the same act extinguished to the creditor.

The debt due him had been paid. The debt he owed was attempted to be continued in existence to screen his property from his creditors.

The law of Louisiana permits contracts between husband and wife, only the instances specially authorized by the following Articles of the Code:

1. "Besides the general incapacity which persons of certain description are under, there are others applicable to certain contracts, either in relation to the parties, such as husband and wife, tutor and ward, whose contracts with each other are forbidden." La. Civil Code 1790.

"The contract of sale between husband and

wife can take place only in the three following cases:

1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

2. When the transfer made from the husband to the wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

3. When the wife makes a transfer of property to her husband in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties their rights, if there exist any indirect advantage. La. Civil Code 2446.

The law of Louisiana does not permit any other contract between the husband and the wife. 38 A. 813.

The contract under consideration, if anything at all, was a surrender by the wife of the general mortgage granted to her by law for the restitution of her paraphernal effects, and liquidation and settlement of the same, by the transfer of a special mortgage held by a third person, which has been paid, in lieu thereof. The law of the State does not permit any such contract, except as provided

in Articles 2279 and 2390 heretofore cited, and the husband and the wife being forbidden by law to contract except in the cases specially provided for by law, is absolutely null so far as it affected Mrs. Young, the intervenor—or the creditors of Wade R. Young, her husband.

We submit, therefore, that the judgment appealed from is erronous in the following particulars:

1. That the act of Mrs. B. F. Liddell in cancelling whatever mortgage rights she might have had against her husband, was the perfectly lawful and valid act of a person *sui juris*, subordinating her claims, if she had any, to those of the plaintiff.

2. That the judgment relied upon by her is void for want of jurisdiction of the court which rendered it, and for want of execution as required by law.

3. That the claim asserted by her, if it is in legal existence, is a legal mortgage which did not interfere with the sale of the property at any price, the property passing into the hands of the purchasers subject to whatever rights she might be able to maintain against it, and that the Judge of the Circuit Court erred in annulling the marshal's

sale, and perpetually enjoining the purchaser from taking possession under the title thereby conveyed.

Respectfully Submitted,

CHARLES J. BOATNER,
of Counsel.

Office Supreme Court, U. S.
FILED.
DEC 13 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

E. NALLE & Co.,
vs.
WADE R. YOUNG, ET. AL. } No. 119

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF LOUISIANA.

BRIEF OF DEFENDANT AND INTERVENING PETITIONER, APPELLEES.

SUPREME COURT OF THE UNITED STATES.

E. NALLE & CO.,
vs.
WADE R. YOUNG, ET. AL. } No.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF LOUISIANA.

BRIEF OF DEFENDANT AND INTERVENING PETITIONER, APPELLEES.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE YOUR HONORS: This is an appeal by the plaintiffs and purchasers in a foreclosure sale suit from a decree sustaining the opposition of the defendant, mortgagor, and the intervening petitioner, claiming to be the holder of a prior special mortgage, to the confirmation of the sale, on the ground that the attempted renunciation by the wife of her special mortgage in favor of the plaintiffs to secure the husband's debt was void, and that, as the price offered was not sufficient to discharge the special mortgage of the wife, which had a preference over the mortgage of the plaintiffs, there could be no adjudication.

STATEMENT OF FACTS.

The husband and wife were married in the State of Mississippi, October 25th, 1865, and in November, 1865, went to reside in Tensas parish, Louisiana, and resided

there continuously until January, 1870, when they removed to Catahoula parish, and resided there continuously until February, 1876.

In the year 1870, the wife acquired as her separate estate, a policy of insurance on the life of her deceased father for the sum of five thousand dollars and an interest in a certain cotton plantation with the appurtenances. P. 380 and 390, original record.

The husband received the proceeds of the insurance policy and disposed of the same for his individual interest, and at the Probate sale of the plantation and appurtenances purchased the wife's interest, and thereby became indebted to her for her separate and paraphernal estate to the amount of seven thousand five hundred dollars, to secure the repayment of which, and the restitution of her paraphernal effects, the wife had a legal and general mortgage on all the property of her husband. Civil Code, Articles 2390, 2391.

In February, 1876, the husband removed to the parish of Concordia, for the purpose of practicing law, and established his office at Vidalia, in said parish, and at the same time, for the purpose of educating the children, rented a house for his family in the city of Natchez, on the opposite side of the Mississippi river, and established them there. P. 390.

The husband continued to reside in Louisiana, practiced his profession in the courts of the State, claimed and exercised the rights of citizenship, attended the Conventions of his party, served as U. S. Supervisor and Commissioner of Elections, and was a candidate for office, and had no business or other interest in Mississippi than to spend as much of his time with his family as his business permitted. P. 390.

In the year 1877, in the settlement of the estate of B. F. Young, the husband's father, which involved property in Mississippi, and in Tensas and Catahoula parishes,

Louisiana, a transaction was had between the husband, his co-heir Mrs. Metcalfe, and the wife, by which Mrs. Metcalfe transferred to the wife a special mortgage which she held on the interest of the husband in the St. Peter plantation, the property in controversy, for the sum of seven thousand five hundred dollars, and the wife accepted it in satisfaction of her general mortgage on the interest of the husband in the property of the estate in Catahoula parish. P. 314.

In the year 1880 the husband removed his law office from Vidalia, in Concordia parish, to Delta, in Madison parish, and after that time lived in hotels and boarding houses, and only came to Natchez at intervals, for the purpose of visiting his family. P. 390.

In the year 1881 the wife brought suit against her husband, in the District Court of Tensas parish, for a dissolution of the community of acquets and gains, and the restitution of her paraphernal effects, and obtained a judgment of separation of property, and a personal judgment for seven thousand five hundred dollars, recognizing and decreeing the enforcement of her special mortgage on the property in controversy. P. 319, 339.

In the year 1882 the husband proposed to borrow from plaintiff's firm the sum of fifteen hundred dollars, to be secured by mortgage on the same property, and tendered a mortgage with the wife's renunciation in the form provided by the Statute, (Civil Code, Articles 129, 130).

Instead of accepting this mortgage so tendered, plaintiffs' firm rejected it, and upon the advice of their own attorney, and a member of their own firm, required that the wife, as security for the debt, should consent to renounce her special mortgage in their favor by authorizing the cancellation and erasure of her mortgage. P. 135, 107, 112, 117.

This was attempted to be done, as appears from the mandate and note on the margin of the act of mortgage,

and the mortgage was executed by the husband in favor of plaintiffs' firm, and accepted. P. 302.

In October 1882, the husband finally abandoned his residence in Louisiana, and removed his law office to Vicksburg, Mississippi, and became a citizen of that State, *animo et facto*. P. 390.

In the year 1883 plaintiffs' firm instituted an ordinary foreclosure sale suit on the mortgage in the State Court, and defendant answered and removed the suit to the U. S. Circuit Court for the District. P. 1 to 18.

Edward Nalle, of the firm, died *pendente lite*, and suit was revived by his children and heirs. P. ——.

After various proceedings, a final decree was rendered November 6, 1886, finding the amount due on the mortgage to be the sum of one thousand six hundred and thirty dollars, with eight per cent. per annum interest from December 1, 1882, and five per cent. Attorney's fees, subject to a credit of seventy-four dollars on that day. P. 225.

The Marshal proceeded to sell the property in execution of the decree, and on July 30, 1887, against the protest of the appellees, sold and adjudicated it to Mrs. Mary Gohlson, one of the plaintiffs, for the price of two thousand dollars, on a credit of twelve months, and without awaiting the confirmation of the sale, or giving the defendant an opportunity to file an opposition, accepted a twelve month's bond for the price, executed a deed to the purchaser, and was proceeding to put her in possession of the property. P. 229.

The defendant then filed an opposition to the confirmation of the sale, and a bill to have the plaintiffs, the purchaser and the Marshal enjoined from disturbing him in the possession of the property, on various grounds, of which the one material to be stated is that the attempted renunciation by the wife of her special mortgage in favor of the plaintiffs was void, and that as the price offered was

not sufficient to discharge the special mortgage of the wife which had a preference over the mortgage of plaintiffs, there could be no adjudication. P. 261 and 287.

Louisiana Code of Practice, Article 684.

As the validity and rank of the wife's mortgage was to be passed on, and as she had the same right to contest the adjudication, she was a proper and necessary party to the issue, and was allowed to file an intervening petition. P. 239 and 300.

The plaintiffs moved to strike from the files the opposition to the confirmation of the sale, and the injunction bill, on the ground that the acceptance of the bid, and the execution of the deed by the Marshal had the effect of divesting defendant's title, and vesting it in the purchaser, and that the only remedy was by a direct action attacking the validity of the sale, and this being overruled demurred, plead and answered, attacking the validity of the wife's special mortgage on various grounds, all of which were anterior to her judgment recognizing and enforcing the mortgage, and anterior to the debt and mortgage of plaintiffs, and contended that the wife was a resident of Mississippi, and *sui juris*, at the time of her attempted renunciation. Pp. 327 and 334 and 340.

The Court decided, upon the authority of Equity rules, 8, 9, 90 and 92; Jones on Mortgagos, Sections 1608, 1637 and 1638; Williamson vs. Berry, 8 Howard 546, and Gaines vs. Relf, 15 Peters 9, that the acceptance of the bid conferred no title upon the purchaser, and that the Court was bound to proceed in equity causes according to the principles, rules and usages which belong to the Courts of Equity, as contradistinguished from Courts of Common Law:

Decided upon the authority of Articles 129 and 130 of the Civil Code, and the cases of Gasquet vs. Dimitry, 9 Louisiana, 592; Succession of Gremillon, 4 Annual 411; Ashford vs. Tibbitts, 11 Annual 167, and Rhea vs. Rhen-

ner, 1 Peters 105, that a substantial compliance with the proviso of the Statute was essential to the validity of the renunciation, and that the attempted renunciation by having the wife authorize the cancellation and erasure of her special mortgage was void for want of compliance;

Decided upon the authority of Article 1993 of the Civil Code, and the cases of Farrell vs. O'Neal, 22 Annual 619, Hanny vs. Maxwell, 24 Annual 49, and the principles of general jurisprudence, that the correctness of the judgment of the State Court, in favor of the wife against her husband for the sum of seven thousand five hundred dollars, recognizing and making executory her special mortgage on the property, could not be contested by the plaintiffs, whose claim arose after the judgment;

And decided upon the authority of Article 684 of the Code of Practice, and the cases of Trudeau vs. McVickar, 1 Annual 428, and Brine vs. Hartford Insurance Company, 6 Otto 627, that the Statute is a rule of property obligatory on the Federal Court, and that as the price offered did not exceed the special mortgage of the wife, which had a preference over the mortgage of the plaintiffs, there could be no adjudication, and the sale was void, and overruled the demurrer and plea, and rendered a final decree in favor of the defendant and intervening petitioner.

The plaintiffs and purchasers have appealed from this decree, and the motion of the appellees in this Court to have the appeal dismissed, because the matter in dispute, exclusive of costs, does not exceed the sum of five thousand dollars, has been denied, but no opinion has been delivered on the question of jurisdiction.

ARGUMENT.

As no assignment of errors has been filed, and Counsel has not at this time been served with a copy of the brief of appellants, it is not possible to know of what errors the appellants complain.

All the evidence material to the decision of the questions presented by the pleadings is set out in the note of the evidence adduced at the hearing of the opposition to the confirmation of the sale, on page 405 of the original record.

The conduct of the Marshal at the sale, as disclosed by the opposition to the confirmation of the sale, and the injunction bill, and by the testimony of the mortgage debtor, in refusing to accept the highest bid, and in allowing the plaintiffs to withdraw their first bid, and to make another for a smaller amount, and in accepting the bid for two thousand dollars from plaintiffs, and immediately proceeding against the protest of the mortgage debtor, to adjudicate the property to them, or to one of them, on a credit of twelve months, and to attempt to put them in possession of the property, without affording the debtor an opportunity to oppose the sale, in order to get the immediate payment of his bill of costs by the plaintiffs, was of itself enough to justify the Court in rejecting the sale.

If there was any question as to the right of plaintiffs to require the reimbursement to them of the taxes paid by them on the property before the deed was passed, it was a question to be submitted to the Court, and not a question to be decided by the Marshal, and it was his plain duty to make his report to the Court for that purpose.

For his conduct in allowing the plaintiffs to withdraw their first bid, and to make another for a smaller amount, and in accepting this last bid, and in proceeding to usurp and exercise the powers of the Court in order to get his fees, there could be no excuse.

The consequence of his misconduct was that a property worth four thousand dollars, and for which the plaintiffs had bid three thousand dollars, and another had bid more, was to be conveyed to the plaintiffs for two thousand dollars, and the debtor was to be denied even the right to oppose the sale.

Such proceedings cannot be tolerated in any Court governed by the usages of the Chancery system, and common justice required that the sale should be set aside.

On this ground alone it is respectfully submitted that the decree sustaining the opposition to the confirmation of the sale should be affirmed.

I.

The first contention of the appellants, presented by the motion to strike from the files the opposition to the confirmation of the sale, the injunction bill, and the intervening petition, is founded upon the theory that in a foreclosure sale suit in the Circuit Court of the United States for the District of Louisiana the proceedings are to be conducted, not according to the principles, rules and usages which belong to the Courts of equity, as contradistinguished from Courts of common law, but according to the practice of the State Courts, and that the acceptance of the bid by the Marshal, and his deed to the purchaser, had the effect of an adjudication by the Sheriff, (Code of Practice, Art. 694.) and transferred to the purchaser a title which could be attacked only by a direct and original suit.

This contention is in effect that in the Circuit Court for the District of Louisiana, the practice of the State Courts shall be adopted instead of the rules prescribed by this Court, both at law and in equity.

Such contention is disposed of by the opinion of this Court in the case of Williamson vs. Berry, 8 Howard 546, and of Gaines vs. Relf, 15 Peters 9. In the latter case this Court said; "But we think the occasion a proper one to remark that if any such rule has been made by the District Court of Louisiana, it is in violation of those rules which the Supreme Court of the United States has passed to regulate the practice in the Courts of equity of the United States; that those rules are as obligatory upon the Courts of the United States in Louisiana, as upon all other United

States Courts; and that the only modifications or additions that can be made in them, by the Circuit or District Courts, are such as shall not be inconsistent with the rules thus prescribed; and that where such rules do not apply, the practice of the Circuit and District Courts must be regulated by the practice of the Court of Chancery in England.

That parties to suits in Louisiana have a right to the benefit of these rules; nor can they be denied by any rule or order, without causing delays, producing unnecessary and oppressive expenses; and in the greater number of cases, an entire denial of equitable rights."

Payne vs. Hook, 7 Wallace 425.

The right of the defendant to oppose the confirmation of the sale was an equitable right which could not be denied by any rule of Court, nor impaired by the laws of the State, which prescribe the modes of redress in its Courts.

In the former case this Court said: "It involves what has been the practice in courts of equity, which from long standing, habitual use, and uniform judicial acquiescence, has become law—law in England, law in New York, law for the Courts of equity of the United States, and law in every State of the Union, except as it may have been modified by the legislation of the States.

The usual mode of selling property under a decree or order in Chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to the purchaser. It is only the master's approval of the sale, and is one step towards a purchaser's getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, according as the sale may have been made either privately or at auction. That report then becomes

the basis of a motion to the Court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the Court, unless cause is shown against it."

Jones on Mortgages, Sections 1608, 1637 and 1638.
Equity Rules 8, 9, 90 and 92.

As the purchaser was no more than a preferred bidder until the sale had been confimed by the Court, she had no right to the deed, nor to the possession of the property, and the injunction was rightfully granted to protect the defendant against the threatened trespass until the Court could hear the opposition to the confirmation of the sale.

II.

The second contention presented by the demurrer, plea and answer, is that the effect of the transfer of the mortgage by Mrs. Metcalfe to the wife was to extinguish it, or that the wife had no capacity to accept such transfer, or that the mortgage, for some cause anterior to the judgment of the State Court, and to the origin of plaintiffs' claim, was invalid. It is an elementary principle of general jurisprudence, which requires little or no citation of authority, that the plaintiffs have no concern with the acts of their debtor before the origin of their debt, and cannot contest even in case of fraud, the correctness of the judgment of the wife against her husband.

The transfer of the mortgage to the wife was made in 1877, and the judgment of separation of property, recognizing the special mortgage held by the wife, was rendered in 1881, while the claim of plaintiffs did not arise until May 1882.

The principle has been embodied in the Louisiana Code, and recognized by numerous decisions of the Courts of the State.

Art. 1993. No creditor can, by the action given by

this Section, sue individually to annul any contract made before the time his debt accrued."

"We think the correctness of that judgment or the sufficiency of the evidence upon which it was rendered can not be inquired into by the plaintiff, whose claim arose subsequent to its rendition."

Farrell vs. O'Neil, 22 Annual 620.

"They did not prove, nor even allege, that H. Hansell was a creditor at the time the judgment of separation was rendered, and it was therefore logically impossible for them to establish their allegation that it was rendered by collusion to defraud him."

Hanley vs. Maxwell et al., 24 Annual 50.

The plaintiffs have not even alleged that the judgment was rendered by collusion to defraud anyone, and they can have no possible concern with a transaction had between the only parties interested five years before their debt accrued, nor question the correctness of a judgment rendered by a Court of competent jurisdiction one year before their debt accrued, recognizing and giving effect to that transaction.

There was no error then in the decree, overruling the demurrer and plea on that ground.

III.

The third contention is that the wife, at the time of the renunciation so attempted, was a resident of Mississippi, and *sui juris* by the Statute of that State, and therefore competent to authorize the cancellation and erasure of her mortgage.

The answer to this contention is that the Statutes of Louisiana provide equally for the case of the married woman residing in the State, and the married woman temporarily or permanently absent from the State.

"Art. 129. Married women above the age of twenty-one years, shall have the right, with the consent of their

husbands, by act passed before a Notary Public, to renounce in favor of third persons, their matrimonial, dotal, paraphernal, and other rights. The Notary Public, before receiving the signature of any married woman, shall detail in the act, and explain verbally to said married woman out of the presence of her husband, the nature of her rights, and of the contract she agrees to."

"Art. 130. A married woman having a mortgage or privilege on the property of her husband, may appoint one or more agents, with power in her behalf during her temporary or permanent absence from the State, to intervene in any contract of mortgage or sale made by the husband, and sign in her behalf such renunciation of said mortgage or privilege as the wife herself might do if personally present, and such power may be either general or special, and may be executed in the United States before any Judge or Justice of the Peace, or Notary, or Commissioners of this State, and in foreign countries before any Consul, Vice-Consul, or Consular or Commercial agent of the United States."

Louisiana Civil Code.

The married woman temporarily or permanently absent from the State can only renounce her mortgage or privilege as she might do if personally present, by having the officer detail in the act of appointment, and explain verbally to her, out of the presence of her husband, the nature of her rights, and of the contract she agrees to.

If the capacity of the married woman in such case was to be determined by the law of her domicil, and not by the law of the *situs*, the second article would be without effect, because her power would be derived from the former, and in a State where the common law prevailed she would have only the power conferred by that system, and in a State where she was made *sui juris* by Statute she would need no such authority.

It is manifest that the intent of the law was to make

both the power and the form equal and uniform in all cases, and the married woman permanently absent has the same power, and must pursue the same formalities, as the married woman temporarily absent.

Nor can it be argued that the law contemplates that the formalities prescribed must be observed by the married woman present in the State, and can be dispensed with by the married woman temporarily absent.

Nor can it be presumed that the law contemplates that the married woman temporarily absent shall be considered a non-resident, nor that the married woman permanently absent shall be considered a resident.

In fact the wife was present in the State and executed the appointment before a Notary Public in the parish of Concordia.

And in fact the wife was not a resident of Mississippi at the time of the attempted renunciation.

"A married woman has no other domicil than that of her husband."

Civil Code, Article 39.

There is no evidence that the husband became, *animo aut facto*, a resident of Mississippi until October 1882, nor that he ever became, or intended to become a resident of Natchez.

It is true that he rented a house in Natchez, immediately opposite to Vidalia, and established his family there, for the purpose of educating the children, and spent as much time with them as his business permitted, but in doing this he did what residents of Louisiana had done for many years without question.

It is in evidence that the late Judge Spencer, at the time of his election to Congress in 1884, and at the time of his appointment to the bench of the Supreme Court of Louisana, in 1877, was, and had been for many years, similarly situated, having his family in Natchez, and his law office and his business in Louisiana. P. 490, 345, 366.

Natchez is the commercial and social centre for that portion of Louisiana, and for many years residents of Louisiana had been accustomed to avail themselves of the advantages so offered, as they do to this day.

The question first came before the Supreme Court of Louisiana in the case of Sanderson vs. Ralston, 20 Annual 319, and after exhaustive discussion was finally decided on a rehearing, by a divided Court of three to two. This decision was considered to have settled the question, and it will be noted that the Court in the first opinion, p. 315, found that the House in Mississippi occupied by Mrs. Ralston was her property, indicating a permanent residence, and that the intention of Ralston was shown by his own declaration in public acts.

The question again came before the Court in the case of State ex rel. vs. Steele, and it should be noticed that Steele had sold his house in Tensas parish and invested the proceeds of it in the purchase of another house in Natchez, where he moved his wife and children, but had rooms permanently engaged at his partner's house in St. Joseph, which he occupied when he was in that parish, and professionally practiced in the two parishes, and in New Orleans. 33 Annual 910.

The Court decided that Steele had not forfeited his domicile in the parish of Tensas.

The opinion in that case should control this, because the facts are the same, except that in Steele's case the domicile of election was in Tensas, and not in Concordia parish.

In both cases the defendants were practicing attorneys who had their law offices at Vidalia, Louisiana, and practiced their profession in the Courts of the State.

Steele had a partner and a law office in Tensas, and when he was in that parish occupied rooms in the house of his law partner, delared that his domicile, and registered and voted there.

In this case the defendant had his law office in Concordia parish, declared that his domicile, and registered and voted there.

If it was competent far Steele to retain his domicile in Tensas parish by having a law office and a partner, and by occupying rooms in the house of his partner when there, it was much more competent for the defendant, who had his law office in Concordia parish, and transacted all of his business and spent most of his time there, to elect that as his domicile.

The public declaration has no effect, except as an evidence of intent in doubtful cases.

"The domicile of each citizen is in the parish wherein he has his principal establishment.

The principal establishment is that in which he makes his habitual residence; if he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereafter prescribed, any one of the said places where he resides may be considered as his principal establishment, at the option of the persons whose interests are thereby affected." Civil Code. Art. 38.

"A change of domicile from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." Civil Code, Art. 41.

"This intention is proved by an express declaration of it before the recorders of the parishes, from which and to which he shall intend to remove.

This declaration is made in writing, is signed by the party making it, and registered by the Recorder." Civil Code, Art 42.

"In case this declaration is not made, the proof of this intention shall depend upon circumstances." Civil Code, Art. 43.

Steele's case has always been considered to have car-

ried the doctrine of constructive residence to the extreme limit, because he was a public officer who was required by the Constitution of the State to have an actual residence in his district, and he had sold his house in Tensas Parish, and invested the proceeds of it in another house in Natchez, and had removed his family to Mississippi, and his law office to Concordia Parish, and offered no other evidence of an intention to retain his domicile in Tensas parish than the public declaration.

In the latter case of Hyman vs. Schlenker, 44 Annual ——, the Court approved the decision in Steele's case, but refused to extend the doctrine, and decided that Schlenker had fixed, and intended to fix his principal establishment, his habitual residence, his home, in Natchez; not for any transient purpose of health or convenience, but in permanence, as indicated by his entering commercial business there, and by his whole conduct, and had thereby forfeited his domicile in Louisiana.

It follows that by the local law, as interpreted by the Courts of the State, the domicile, or constructive residence, can be retained unless forfeited by the acquisition of a permanent residence in another State, and that one who establishes his family in another State for purposes of health, or education or convenience, and pursues his business in Louisiana, does not thereby forfeit his domicile, because he passes his liesure hours with his family in the other State.

If, however, the defendant by establishing his family at Natchez and his place of business at Vidalia, as so many have done before and since, unwittingly acquired a residence in a State in which he had no business, and no interest other than his family, he abandoned that residence, with no intention of returning, when in 1880 he removed his law office to Delta, in Madison Parish, and ceased to live with his family in Natchez, except to visit them at intervals.

At the time of the execution of the mortgage the place of business of the husband was in Madison Parish, and he lived in hotels and boarding houses, and the domicile of the husband and wife was in that Parish.

It would not be contended that a resident who sent his family to Heidleburg, or Cambridge, or Vanderbilt for the purpose of having his children suitably educated, and continued to pursue his business at home, acquired a residence in the foreign State, because he ceased to be a householder, and lived in hotels and boarding houses and visited his family at such times as his business permitted, and the proposition applies as well to Natchez as to any other place of education.

There was no error then in the finding of the Court that the wife was not a resident of Mississippi at the time of the attempted renunciation, and that the rights of the parties were to be determined by the local law.

IV.

The Statute of Louisiana provides: "The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." Civil Code, Art. 2398.

In the case of Gasquet vs. Dimitry, 9 Louisiana 592, it was decided that where the wife renounces her right of mortgage in favor of her husband's creditor, as a security for a debt of his contracting, she thereby becomes his security, and does indirectly that which she is positively forbidden by law to do directly.

This decision led to the enactment of the Statute of 1835, now Article 129 of the Civil Code, before cited, which authorized married women to renounce, by notarial act, with the consent of their husbands, in favor of third persons, their dotal, paraphernal and other rights.

In construing this Statute, in the case of Succession

of Gremillon, 4 Annual 411, the Court said: "But the Statute contains the proviso, that the Notary Public, before receiving the signature of any married woman, shall detail in the act, and verbally explain to her, out of the presence of her husband, the nature of her rights and of the contract she agrees to.

A substantial compliance with the proviso is essential to the validity of the renunciation. One of its motives was to guard the wife against the influence of the husband, the moral effect of whose presence might control her will, to the prejudice of her interest This formality was disregarded in the present case, and the renunciation must be held inoperative."

Again, in the case of Ashford vs. Tibbitts, 11 Annual 168, the Court said: "For the principal, we think her legal mortgage should have been recognized, inasmuch as her renunciation was defective, in that the Notary did not detail in the act the nature of the rights she renounced. See Acts 1835, p. 153; Succession of Grenvillor, 4 Annual, 412."

In Succession of Montgomery, 44 Annual ——, the Court said:

"A simple reading of the provision forcibly impresses upon the mind that the law permits a renunciation, provided the Notary, before receiving the signature of the married woman, explains to her verbally, out of the presence of her husband—First, the nature of her rights and that of the contract she agrees to—and second, that he shows that he has done so by detailing in the act the nature of the double information which he has thus given her, and that the formalities have been fully observed.

It is not until after he has so furnished her this information, and thus detailed what has occurred, that he has authority to receive her signature. A compliance with these requirements is an essential condition precedent for the validity of such renunciations, which is exacted for the

protection of married women, who are *inopes consolii,* in order to shield them, as effectually as practicable, from marital pressure, intimidation, or captation. It is nothing but just that they should previously know their rights, just as they are, with precision, and it is for that purpose that the Notary is required to inform them, and to show how he has done so, in order that they may not afterwards deny that they had full knowledge of those rights, the whole, of course, to occur, out of the presence of her husband. The proof which the law allows to show that these formalities have been gone through with faithfully is the Notary's recital of the act."

This interpretation is in accord with the doctrine of common law.

In Rhea vs. Rhenner, 1 Peters 109, this Court said: "The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May, 1819, are therefore inoperative and void."

As the law of Maryland governed that case, so the law of Louisiana must govern this case, and without the separate examination, and other solemnities required by law, the attempted renunciation by the wife was inoperative and void.

The wife not only did not renounce in the form, and with the solemnities, required by law, but in compliance with the demand of plaintiffs' attorney, and a member of the firm, and for some purpose of their own, she attempted to become security for the debt of her husband, by executing a notarial power, without the detail in the act, and the explanation out of the presence of her husband, of the nature of her rights and of the contract she agreed to, in which she authorized the cancellation of her mortgage, which the law positively prohibited.

Such contract was absolutely void *ab initio,* and the

wife's mortgage remains as if no such entry had been made on the margin of the act.

V.

The statute of Louisiana, (Article 684 of the Code of Practice,) provides: "Art. 683 But if there exists on the property any privileges or special mortgage, in favor of other persons than the judgment creditor, and which are preferred to him, the Sheriff shall announce that the purchaser shall be entitled to retain in his hands, out of the price for which the property was adjudicated, the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject, but that he shall be bound to give his obligation for the surplus of the purchase money, if there be any, and subscribe his obligation at twelve months credit, with security as is stated above.

Art. 684. Consequently, if the price offered in this case by the highest and last bidder is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication, and the Sheriff shall proceed to seize other property of the debtor, if there be any."

This statute is a rule of property obligatory on the Federal Courts in the State.

In Brine vs. Hartford Fire Insurance Co., 6 Otto 627, this Court said: "It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a Court of the United States, on the ground that the equity practice of these Courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the Circuit Courts for their own guidance. And treating all the pro-

ceedings subsequent to a decree which are necessary for it enforcement as matter of practice, and as belonging solely to the course of procedure in Courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such sale come within the rules of practice of the Court, but that the effects of such sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the Court, as found in the sources we have mentioned.

On the other hand, it is said that the effect of the sale and conveyance made by the Commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will or by judicial proceedings, are subject to and may be governed by the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State existing at the time a mortage or any other contract is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all Courts which assume to give remedy on such contracts.

We are of the opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from State control of the Chancery practice of the Federal Courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition, that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the Courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of

Chancery methods, by which it molds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form." Bronson vs. Kinzie et al., 1 Howard 311.

In Collier vs. Stanbrough, 6 Howard 21, this Court said: "In Louisiana, the debts due to an execution debtor may be seized and sold on execution, like other movable property, and equally with the immovable property; in respect to lands seized on execution, it is necessary, before they are offered for sale, that they should be appraised by persons appointed for the purpose, and if, when offered at public sale, two-thirds of the appraised value is not bid, the officer who is attempting to sell shall not adjudicate the sale, but cease, and re-advertise the property, and again offer it at public outcry on a credit of twelve months; and this mode of proceeding, having been adopted by rule in the Circuit Court of the United States held in Louisiana, governs the Marshal of that Court."

The requirement that "if the price offered in this case by the highest and last bidder is not sufficient to discharge the privileges and mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication," is just as much a positive right, and just as much a rule of property, and just as much a part of the Statute, as the requirement that the property should be appraised, and if it did not bring two-thirds of the appraised value at the first offering should be re-offered at twelve month's credit for whatever it would bring, and was just as much a rule of the Court.

The Marshal complied with the one requirement, and re-offered the property at twelve month's credit, but al-

though the certificate of mortgage furnished to him by the Clerk showed the existence of the prior special mortgage of the wife, and on its face the nullity of the attempted renunciation, allowed himself to be influenced by plaintiff's Attorney, and in disregard of the written protest of appellees adjudicated the property to one of the plaintiffs for two thousand dollars.

The question, then, for the consideration of this Court is the effect of such an adjudication under the laws of Louisiana.

"Property specially mortgaged cannot be sold at the suit of a third party, unless it bring more than the mortgage. If there be no surplus after paying the mortgage, there is no price which is of the essence of every sale; and such sale would be useless to plaintiff and oppressive to defendant. But if the bid be for less than the mortgage, the sale would be destructive to the mortgagee's rights." Act 28 January, 1817, par. 17, No. 9; 3 New Series 604; 4 do. 154; 7 do. 386; 9 Annual 216.

"Where the highest and last bid is insufficient to discharge a mortgage having a preference over the seizing creditor, there can be no adjudication." 7 Robinson 406; 10 do. 65; 12 do. 130; 1 Annual 32.

The bonds of a purchaser, evicted by a mortgage not mentioned in the certificate, will be annulled as given in error and without consideration. The omission of itself invalidates the adjudication." McRae vs. Chapman, 10 Robinson 65.

"The price must exceed the preferred mortgages though simulated, as even in that case they form part of the price due the owner, had the sale been legal." Trudeau vs. McVicar, 1 Annual 426.

The rule applies to foreclosure sales as well as to sales in execution. Langfitt vs. Brown, 5 Annual 231. "The defence is, that before the judicial sale, the stock mortgage rested upon the property, and had been transferred by the company to the State; that this mortgage had the prefer-

ence over the one under which the sale was made; and that as the amount of the adjudication was less than the amount of the first mortgage, there was no sale, and the bond is void.

This defence prevailed in the District Court, and the plaintiffs appealed. * * * * *

We are of opinion, that as the bid offered at the judicial sale was less than the amount of the stock mortgage, there was no sale, and the defendant is not bound by his signature to the bond. The judgment is therefore affirmed with costs."

"In a judicial sale, of land mortgaged to secure the payment of stocks, where the amount of the adjudication does not exceed the amount of the stock mortgage which is the first in rank, the sale is null; such a defect is not a a mere informality, which can be cured by the lapse of five years." Haynes vs. Courtney, 15 Annual 630.

Such has been for seventy-five years the law and jurisprudence of the State, which was a rule of property, binding on the Federal Courts in the State, and there was no error in the decree of the Circuit Court giving effect to the rule, and refusing to confirm the sale so made.

It is, therefore, respectfully submitted that the decree should be affirmed with costs.

WADE R. YOUNG,
Solicitor and pro se.

OCT 17 1895
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

E. NALLE & Co.,
vs.
WADE R. YOUNG, ET. AL.
} No. 17.

SUPPLEMENTAL BRIEF OF APPELLEES.

Since the filing of the brief for the appellees at the last term, the Supreme Court of Louisiana, in the case of Luckett vs. Canadian & American Mortgage Co., (47 Louisiana Annual ——), reported on page 836, of Volume 17 of the Southern Reporter, of the West Publishing Co. Series, has delivered an opinion which disposes of the question of the right of a married woman to renounce her paraphernal rights without a compliance with the formalities of the law, by authorizing the cancellation of her mortgage. In that case the pretended authorization read; "Mrs. Nina Luckett, wife of H. P. Luckett, does hereby acknowledge the full payment of a certain mortgage given by said H. P. Luckett to her; and the clerk of the District Court of the Parish of Rapides, Louisiana, is hereby requested to enter full satisfaction of said mortgage upon the records of his office, etc., etc." The court held that the act importing a renunciation was invalid, because not evidenced by an authentic act made in full compliance with the requirements of Revised Civil Code, Art. 129, and took occasion to review and affirm the jurisprudence of the State on the subject. The act importing a renunciation in this case is almost identical with the one held to be invalid in that case, and is equally invalid for want of compliance with the requirements of the article.

The questions raised by the brief of the appellants have been so often decided adversely to their contention, and the jurisprudence on the subject is so well settled, that further argument would seem to be needless. It is therefore respectfully submitted that the decree should be affirmed.

WADE R. YOUNG,
For the Appellees.

N. B. The letter accepting the mortgage will be found on page 79 of the Record